

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TRACEY K. RANDALL,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 13-cv-05652 BJR JRC

REPORT AND RECOMMENDATION
ON PLAINTIFF'S COMPLAINT

Noting Date: December 19, 2014

This matter has been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR 4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261, 271-72 (1976). This matter has been fully briefed (*see* ECF Nos. 21, 25, 28; *see also* ECF Nos. 30, 31, 32).

After considering and reviewing the record, the Court finds that the administrative law judge ("ALJ") erred in evaluating the medical evidence and when assessing plaintiff's residual functional capacity ("RFC"). The ALJ failed to account for plaintiff's

1 symptoms and side effects from medications that he takes to control his seizure disorder,
2 both when evaluating the medical evidence and when determining plaintiff's RFC.
3 Because a determination of plaintiff's credibility is based partly on the assessment of the
4 medical evidence, plaintiff's credibility should be assessed anew following remand, and
5 the lay witness evidence of Julie Wilson should be re-assessed as well. Finally, the
6 possible conflict of interest posed by Dr. Carla van Dam's report should also be reviewed
7 in light of the evidence presented by the plaintiff, and the medical evidence re-evaluated.

8 BACKGROUND

9
10 Plaintiff, TRACEY K. RANDALL, was born in 1977 and was 23 years old on the
11 alleged date of disability onset of December 31, 2000 (*see* Tr. 178-79, 180-83). Plaintiff
12 completed high school and has a general studies associate's degree (*see* Tr. 53). Plaintiff
13 has work experience as a fast food worker, pizza cook, moving van driver/helper,
14 custodian, janitor, and warehouse worker (*see* Tr. 79-80, 221-35). He is currently
15 working part-time as a pizza cook (*see* Tr. 51, 53).

16 The ALJ found that plaintiff has the severe impairments of attention deficit
17 hyperactivity disorder ("ADHD"), bipolar disorder, generalized anxiety disorder,
18 personality disorder, and lumbar and cervical degenerative disk disease (*see* Tr. 17).

19 At the time of the administrative hearing, plaintiff was living with three
20 roommates (*see* Tr. 51).

21 PROCEDURAL HISTORY

22
23 Plaintiff's application for Supplemental Security Income ("SSI") benefits pursuant
24 to 42 U.S.C. § 1382(a) of the Social Security Act was denied initially and following

1 reconsideration (*see* Tr. 93-96, 102-07). Plaintiff's requested hearing was held before
2 ALJ Joanne E. Dantonio ("the ALJ") on August 3, 2011 (*see* Tr. 45-88). On January 17,
3 2012, the ALJ issued a written decision finding plaintiff not disabled pursuant to the
4 Social Security Act (*see* Tr. 11-33).

5 On May 28, 2013, the Appeals Council denied plaintiff's request for review,
6 making the written decision by the ALJ the final agency decision subject to judicial
7 review (*see* Tr. 1-4). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court
8 seeking judicial review of the ALJ's written decision in August, 2013 (*see* ECF Nos. 1,
9 4). Defendant filed the sealed administrative record regarding this matter ("Tr.") on
10 January 30, 2014 (*see* ECF Nos. 14, 15).
11

12 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or
13 not the ALJ properly evaluated the medical evidence; (2) Whether or not the ALJ
14 properly evaluated plaintiff's testimony; (3) Whether or not the ALJ properly evaluated
15 the lay witness evidence; (4) Whether or not the ALJ properly assessed plaintiff's
16 residual functional capacity ("RFC"); and (5) Whether or not the ALJ erred by basing her
17 step five finding on an RFC assessment that did not account for all of plaintiff's
18 limitations (*see* ECF No. 21, p. 1).
19

20 STANDARD OF REVIEW

21 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
22 denial of social security benefits if the ALJ's findings are based on legal error or not
23 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
24

1 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
2 1999)).

3 DISCUSSION

4 **(1) Whether or not the ALJ erred in failing to include plaintiff's seizure** 5 **disorder at Step 2.**

6 The ALJ discussed plaintiff's history of seizures prior to the application date, but
7 indicated that she found this impairment to be not severe because plaintiff's seizures were
8 well-controlled with medication and did not cause "significant vocational limitations"
9 (*see* Tr. 17).

10 Although plaintiff concedes in his supplemental briefing that the ALJ's failure to
11 include plaintiff's seizure disorder as a severe impairment arguably is harmless error at
12 step two (*see* ECF No. 32, p. 1, 2 fn. 5), the important determination here is whether or
13 not the relevant limitations related to that impairment are included in the residual
14 functional capacity determination, as will be discussed below (*see infra*, Section (3)). *See*
15 *Smolen, supra*, 80 F.3d at 1290 (the ALJ "must consider the combined effect of all of the
16 claimant's impairments on her ability to function, without regard to whether each alone
17 was sufficiently severe") (citations omitted).

18 **(2) Whether or not the ALJ properly evaluated the medical evidence.**

19 The Commissioner "may not reject 'significant probative evidence' without
20 explanation." *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (*quoting Vincent v.*
21 *Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (*quoting Cotter v. Harris*, 642 F.2d 700,
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1 706-07 (3d Cir. 1981))). The “ALJ’s written decision must state reasons for disregarding
 2 [such] evidence.” *Flores, supra*, 49 F.3d at 571.

3 (A) Side effects from medication

4 According to a relevant federal regulation:

5 Since symptoms sometimes suggest a greater severity of impairment
 6 than can be shown by objective medical evidence alone, we will
 7 carefully consider any other information you may submit about your
 8 symptoms. . . . Factors relevant to your symptoms, such as
 9 pain, which we will consider include: . . . (iv) The type, dosage,
 effectiveness, and side effects of any medication you take her have taken
 to alleviate her pain or other symptoms; . . .

10 20 C.F.R. §§ 404.1529(c)(3)(iv), 416.929(c)(3)(iv).

11 In addition, according to SSR 96-7:

12 In recognition of the fact that an individual's symptoms can sometimes suggest a
 13 greater level of severity of impairment than can be shown by the objective medical
 14 evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe the kinds of
 15 evidence, including the factors below, that the adjudicator *must* consider in
 addition to the objective medical evidence when assessing the credibility of an
 individual's statements:...

16

17 4. the type, dosage, effectiveness, and side effects of any medication the
 individual takes or has taken to alleviate pain or other symptoms...

18 Once the adjudicator has determined the extent to which the individual's
 19 symptoms limit the individual's ability to do basic work activities by making a
 20 finding on the credibility of the individual's statements, the impact of the
 21 symptoms on the individual's ability to function must be considered along with the
 22 objective medical and other evidence, first in determining whether the individual's
 impairment or combination of impairments is "severe" at step 2 of the sequential
 evaluation process for determining disability and, as necessary, at each subsequent
 step of the process.

23 SSR 96-7, 1996 SSR LEXIS 4, at *7-*9 (emphasis added).

1 Although “Social Security Rulings do not have the force of law, [n]evertheless,
2 they constitute Social Security Administration interpretations of the statute it administers
3 and of its own regulations.” *See Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir.
4 1989) (citing *Paxton v. Sec. HHS*, 865 F.2d 1352, 1356 (9th Cir. 1988); *Paulson v.*
5 *Bowen*, 836 F.2d 1249, 1252 n.2 (9th cir. 1988)) (internal citation and footnote omitted).
6 As stated by the Ninth Circuit, “we defer to Social Security Rulings unless they are
7 plainly erroneous or inconsistent with the [Social Security] Act or regulations.” *Id.* (citing
8 *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984); *Paxton, supra*, 865 F.2d
9 at 1356) (footnote omitted).
10

11 Therefore, for the stated reasons, side effects of medication taken for pain, or other
12 symptoms, must be considered when assessing allegations of disabling symptoms. 20
13 C.F.R. §§ 404.1529(c)(3)(iv), 416.929(c)(3)(iv); SSR 96-7, 1996 SSR LEXIS 4, at *7-*9.

14 (B) Plaintiff’s seizure disorder and side effects from medication

15 Plaintiff was diagnosed with a seizure disorder in 2003, after he suffered his first
16 seizure (*see* Tr. 299). Plaintiff experienced seizures again in 2005 and 2006 (*see* Tr. 209,
17 311-13, 317, 369, 469). Plaintiff’s neurologist assessed his seizure disorder as recently as
18 January 2009.

19 Defendant argues that “the ALJ did not improperly exclude consideration of the
20 side effects of medication because plaintiff did not offer objective evidence that his
21 medications caused side effects” (*see* ECF No. 31, pg. 5). To the contrary, the medical
22 records reviewed by the ALJ contain several references to side effects experienced by
23
24

1 plaintiff, and plaintiff's own testimony at the administrative hearing refers to these side
2 effects.

3 Plaintiff's neurologist, Dr. Samuel Coor, assessed his seizure disorder as recently
4 as January 2009 in response to DDS' request for records. Dr. Coor referenced memory
5 loss caused by the seizure medication Keppra, and the fact that the Seroquel "knocks him
6 out" (*see* Tr. 588). Dr. Coor discussed with plaintiff that stopping his seizure medication
7 "is a bad idea" and offered him a surgical referral (*see id.*). Dr. Coor also mentioned that
8 his medication could be "altered to something like Lamictal which does not have the
9 same degree of cognitive changes" (*see id.*). Although this treatment record includes
10 plaintiff's subjective report about his side effects, it also includes the objective
11 substantiation from plaintiff's neurologist that plaintiff's prescribed medication is
12 associated with such a "degree of cognitive changes" (*see id.*).

14 Dr. Coor referred plaintiff to a neurophysiologist, Dr. David G. Vossler, who
15 recommended medication changes to address plaintiff's complaints of memory loss (*see*
16 Tr. 608-10). Dr. Coor and Dr. Vossler continued to adjust plaintiff's medications to
17 maintain control of seizures while minimizing side effects, including adding Strattera (*see*
18 Tr. 606, 749). By July 2009, plaintiff's neurologist noted that his seizures were well
19 controlled and that his cognitive dysfunction was "some improved" with the Strattera (*see*
20 Tr. 760).

22 Office treatment records from Eastside Women's Health similarly reference the
23 side effects plaintiff was experiencing from his medications. In one record, dated
24

1 December 18, 2008, it is noted that “Klonipin [sic] is working well for him. He is having
2 some memory problems, but mostly due to all the meds he is on” (*see* Tr. 597).

3 In addition, in response to his attorney’s questioning, plaintiff testified to the
4 various side effects he experiences as a result of his seizure medication at his hearing
5 before the ALJ (*see* Tr. 71-74). Plaintiff testified about side effects from Keppra, the
6 medication he takes to control his seizures, including the inability to sleep, lack of
7 appetite, and being “loopy” (*see* Tr. 71). Plaintiff testified that he had spoken to his
8 neurologist about the side effects of Keppra, but was advised to keep taking it in order to
9 prevent the seizures. Plaintiff also testified to taking Seroquel, a medication prescribed
10 by his neurologist to help plaintiff sleep and “to keep the crazy down a little bit” (*see* Tr.
11 72). Plaintiff testified that he gets headaches two to three times a week that can last all
12 day, that once every week or two weeks he cannot stop crying, and that when he wakes
13 up in the morning he is “droggy” and is “really tire [sic], sleepy,” “exhausted” (*see* Tr.
14 72-75).
15

16 For the reasons stated and based on the record as a whole, the Court concludes that
17 plaintiff adequately demonstrated that he was experiencing side effects from his seizure
18 medications. Not only did the ALJ fail to state any reasons for disregarding such
19 evidence, she does not refer to such evidence at all. The ALJ erred in evaluating the
20 medical evidence by not taking into account plaintiff’s side effects from his seizure
21 medications.
22

23 (C) Duty to develop the record
24

1 Further, the ALJ “has an independent ‘duty to fully and fairly develop the
2 record.’” *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (*quoting Smolen v.*
3 *Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (*quoting Brown v. Heckler*, 713 F.2d 411,
4 443 (9th Cir. 1983) (per curiam))). The ALJ’s “duty exists even when the claimant is
5 represented by counsel.” *Brown, supra*, 713 F.2d at 443 (*citing Driggins v. Harris*, 657
6 F.2d 187, 188 (8th Cir. 1981)).

7
8 Despite the fact that the ALJ found plaintiff’s seizure disorder to be not severe,
9 there is evidence in the medical record and plaintiff’s own testimony at the administrative
10 hearing regarding his seizure disorder, accompanying symptoms, and the side effects
11 plaintiff experiences from the medications he takes to control his seizure disorder. This
12 is significant probative evidence that the ALJ erred in failing to discuss. *See Flores,*
13 *supra*, 49 F.3d at 570-71 (the Commissioner “may not reject ‘significant probative
14 evidence’ without explanation”) (*quoting Vincent, supra*, 739 F.2d at 1395 (*quoting*
15 *Cotter, supra*, 642 F.2d at 706-07)). In addition, the evidence in the record regarding
16 plaintiff’s side effects from his seizure medication triggered the ALJ’s duty to develop
17 the record on this issue. *See Tonapetyan, supra*, 242 F.3d at 1150 (*quoting Smolen, supra*,
18 80 F.3d at 1288 (*quoting Brown, supra*, 713 F.2d at 443)). The ALJ erred by failing to
19 develop the record regarding plaintiff’s seizure disorder and side effects from
20 medications. The issue of whether or not this error is harmless will be discussed in the
21 context of plaintiff’s RFC (*see infra*, section (3)).

22
23 (D) Plaintiff’s mental impairments
24

1 Plaintiff argues that Dr. Carla van Dam's report should not have been given great
2 weight by the ALJ because Dr. van Dam appeared to have a conflict of interest in that
3 plaintiff believes she was working for both the State and SSA at the time she examined
4 the plaintiff. In her decision, the ALJ addressed plaintiff's attorney's objection, initially
5 raised at the administrative hearing, by noting that Dr. van Dam did not do any
6 evaluations of the claimant for the State agency (*see* Tr. 14). While the evidence cited by
7 plaintiff in his reply brief does not conclusively demonstrate that Dr. van Dam was
8 concurrently working both for the State and for SSA, the submitted evidence does
9 suggest a possible conflict of interest (*see* ECF Nos. 28 and 29). Because "[a]ll
10 implications of possible conflict of interest between medical or psychological consultants
11 and their medical or psychological practices will be avoided" and "[p]hysicians and
12 psychologists who work for us directly as employees or under contract will not work
13 concurrently for a State agency," *see* 20 CFR § 416.919q, the ALJ's determination to give
14 Dr. van Dam's opinion great weight should be considered anew in the context of the
15 evidence provided by plaintiff following remand of this matter.
16

17 Because the Court recommends remanding the matter for further consideration,
18 the medical evidence as a whole, and specifically Dr. Wingate's medical reports, should
19 be assessed anew following remand.
20

21 **(3) Whether or not the ALJ properly assessed plaintiff's RFC, and whether or**
22 **not the ALJ erred by basing her step five finding on an RFC assessment**
23 **that did not include all of plaintiff's limitations.**

24 **(A) Plaintiff's RFC.**

"Where the ALJ has found a severe medically determinable impairment at step

1 two of the sequential analysis, ‘all medically determinable impairments must be
2 considered in the remaining steps of the sequential analysis.’” *Hill v. Astrue*, 688 F.3d
3 1144, 1151 (9th Cir. 2012) (quoting *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007)
4 (citing 42 U.S.C. § 423(d)(2)(B))). However, [t]he ALJ “must consider limitations and
5 restrictions imposed by all of an individual’s impairments, even those that are ‘not
6 severe’” (see SSR 96-8p, 1996 WL 374184 *5).

7
8 Defendant argues that the ALJ’s RFC assessment incorporates limitations that
9 were found by State agency consultants as related to plaintiff’s seizure disorder (see Tr.
10 715, 717, 720), although the ALJ does not explicitly mention plaintiff’s seizures in her
11 discussion of his RFC (see Tr. 19-24). In fact, the only reference to plaintiff’s seizure
12 disorder or side effect symptoms is the inclusion of avoiding concentrated exposure to
13 hazards and vibrations in the ALJ’s RFC assessment and a mention that the plaintiff
14 “testified that he takes Kepra [sic] for seizures and Seroquel to help him sleep, which
15 works well” (see Tr. 19); there is no discussion of the side effects related to the
16 medication plaintiff takes to control his seizures, either by the State agency consultants or
17 the ALJ.

18 The determination regarding an RFC depends on a proper evaluation of the
19 medical evidence. Because the ALJ failed to include seizures from plaintiff’s list of
20 impairments and failed to discuss limitations from plaintiff’s side effects from his seizure
21 medications as noted in the medical evidence and plaintiff’s testimony, the RFC
22 determination was incomplete, flawed, and not supported by substantial evidence in the
23 record. See *Hill, supra*, 698 F.3d at 1161.
24

1 Further, since the ALJ's hypothetical to the VE at Step 5 was based on an RFC
2 that did not include additional limitations that represented plaintiff's seizure disorder or
3 side effects from seizure medications, the ALJ likewise erred at Step 5.

4 (B) Harmless Error

5 The Ninth Circuit has "recognized that harmless error principles apply in the
6 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
7 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
8 Cir. 2006) (collecting cases)). The Ninth Circuit noted that "in each case we look at the
9 record as a whole to determine [if] the error alters the outcome of the case." *Id.* The court
10 also noted that the Ninth Circuit has "adhered to the general principle that an ALJ's error
11 is harmless where it is 'inconsequential to the ultimate nondisability determination.'" *Id.*
12 (quoting *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))
13 (other citations omitted). The court noted the necessity to follow the rule that courts must
14 review cases "'without regard to errors' that do not affect the parties' 'substantial
15 rights.'" *Id.* at 1118 (quoting *Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009) (quoting 28
16 U.S.C. § 2111) (codification of the harmless error rule)).

17
18 When an ALJ fails to find an impairment severe, any error at step two is not
19 necessarily harmless just because the ALJ proceeds to subsequent steps in the sequential
20 disability evaluation process. *See Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012).
21 The Ninth Circuit court concluded that an ALJ erred where the ALJ failed to find severe
22 a claimant's panic disorder when the claimant described symptoms consistent with panic
23 disorder to the ALJ at the administrative hearing. *See id.* The court found that because
24

1 “the ALJ excluded panic disorder from [the claimant’s] list of impairments and instead
2 characterized her diagnoses as anxiety alone, the residual functional capacity
3 determination was incomplete, flawed, and not supported by substantial evidence in the
4 record.” *See id.*

5 Similarly, in this case the ALJ found plaintiff’s seizure disorder to be not severe.
6 However, at the administrative hearing, the plaintiff testified to an inability to work due
7 to seizures and symptoms that included side effects from the medications he takes to
8 control those seizures. In addition to plaintiff’s testimony, medical records contained in
9 the record and reviewed by the ALJ delineate plaintiff’s seizure disorder and the side
10 effects he experiences from the medications he takes for that disorder, as discussed above
11 (*see supra*, section (2)(B)).
12

13 Had the ALJ discussed plaintiff’s side effects from his medication, such as his
14 inability to stay awake and his inability to think clearly, plaintiff’s RFC may have
15 included more limitations in these areas. Altering plaintiff’s RFC likely would have
16 affected the ultimate determination regarding plaintiff’s disability. Therefore, the error is
17 not harmless error. *See Molina, supra*, 674 F.3d at 1115.

18 **(4) Whether or not the ALJ properly evaluated plaintiff’s testimony and the**
19 **lay witness evidence.**

20 A determination of a claimant’s credibility relies in part on the assessment of the
21 medical evidence. *See* 20 C.F.R. § 404.1529(c). Therefore, because the medical evidence
22 must be reviewed anew, plaintiff’s credibility should be reassessed, as well. Further,
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24

1 since the ALJ discounted the lay witness evidence of Julie Wilson, based on the record as
2 a whole, the Court concludes that this lay evidence should also be re-assessed.

3 **(5) Whether or not plaintiff's prior application for SSI benefits should be**
4 **reopened.**

5 In a footnote in his opening brief, plaintiff mentions that he also filed a prior
6 application for benefits on July 8, 2008, and subsequent to his administrative hearing,
7 amended his alleged disability onset date to July 8, 2008 (*see* ECF No. 21 at 2 fn.2).
8 Plaintiff then cites 20 C.F.R. § 416.1488, noting that the prior decision may be reopened
9 within 12 months of the date of the initial determination "for any reason" (*see id.*).
10 Despite there being no further discussion of this issue by plaintiff, defendant, also in a
11 footnote, reiterates that the ALJ decided plaintiff's case from March 3, 2009, the date
12 plaintiff protectively filed his application for SSI benefits, through the date of the ALJ's
13 decision (*see* ECF No. 25 at 2 fn.1). Further, defendant takes plaintiff's mention of 20
14 C.F.R. § 416.1488 as suggesting that plaintiff is requesting his prior application of July 8,
15 2008 be reopened.

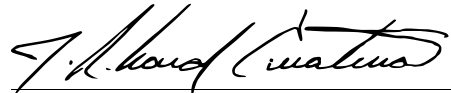
16 Assuming that plaintiff does in fact ask this Court to reopen his prior application,
17 the Court agrees with defendant's position that the ALJ's ruling is based on the period of
18 disability addressed by the ALJ and that a reopening determination is a decision for the
19 ALJ. Further, as defendant informs the Court, "it would be premature to consider the
20 reopening issue [sic] at this time" (*see* ECF No. 25 at 3 fn.2) (*citing Byrnes v. Shalala*, 60
21 F.3d 639, 641 (9th Cir. 1995)). This Court agrees.
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23
24

CONCLUSION

Based on these reasons, and the relevant record, this Court recommends that this matter be REVERSED and REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration. JUDGMENT should be for plaintiff and the case should be closed.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on December 19, 2014, as noted in the caption.

Dated this 25th day of November, 2014.



J. Richard Creatura
United States Magistrate Judge